DOCUMENT RESUME

ED 280 665 RC 016 182

TITLE Sexual Abuse of Indian Children. Hearing before the Subcommittee on Criminal Justice of the Committee on the Judiciary. House of Representatives, Ninety-Ninth Congress, Second Session on H.R. 3826. (January 30, 1986).

INSTITUTION Congress of the U.S., Washington, D.C. House Committee on the Judiciary.

PUB DATE 87

NOTE 42p.; Serial No. 94. Some pages contain marginally legible print.

AVAILABLE FROM Superintendent of Documents, Congressional Sales Office, U.S. Government Printing Office, Washington, DC 20402.

PUB TYPE Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01/PC02 Plus Postage.

DESCRIPTORS American Indian Reservations; *American Indians; *Child Abuse; *Court Litigation; Federal Indian Relationship; Federal Legislation; Hearings; Justice; Punishment; *Sexual Abuse; *Tribes

IDENTIFIERS Congress 99th; *Criminal Justice; Navajo (Nation)

ABSTRACT

This transcript presents testimony and prepared statements regarding H.R. 3826, which proposes to amend Title 18 of the United States Code to make felonious sexual molestation of a minor an offense within American Indian country. Representative Rick Boucher, author of the legislation, indicated that, while the bill would extend to Indians the same protection now governing non-Indians, it would not deprive Indian tribal courts of jurisdiction. Deputy Assistant Attorney General Victoria Toensing supported the legislation because, in conjunction with offenses currently listed in the Major Crimes Act, it would cover all defined serious sexual offenses against Indian children by Indians. Susan Shown Harjo, Executive Director, National Congress of American Indians, indicated that the 126 Indian governments she represents endorse the amendment and see it as necessary to fight the nearly 25% increase in Indian child sexual abuse that took place from 1983 to 1984. Written testimony of the Navajo Nation addressed the definition of "sexual molestation of a minor" and the impact on the Navajo Nation resulting from the disparities in legal standards between Arizona, New Mexico, and Utah. Written testimony of the American Indian Law Center concurred that the legislation is important for solving child sexual abuse. (NEC)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

RC

SEXUAL ABUSE OF INDIAN CHILDREN

ED280665

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

SECOND SESSION

ON

H.R. 3826

SEXUAL ABUSE OF INDIAN CHILDREN

JANUARY 30, 1986

Serial No. 94

MAR 1987
RECEIVED
ERIC/CRESS

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☐ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
59-180 O WASHINGTON : 1987

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

RC016182

BEST COPY AVAILABLE

COMMITTEE ON THE JUDICIARY

PETER W. RODINO, JR., New Jersey, *Chairman*

JACK BROOKS, Texas
ROBERT W. KASTENMEIER, Wisconsin
DON EDWARDS, California
JOHN CONYERS, JR., Michigan
JOHN F. SEIBERLING, Ohio
ROMANO L. MAZZOLI, Kentucky
WILLIAM J. HUGHES, New Jersey
SAM B. HALL, JR., Texas
MIKE SYNAR, Oklahoma
PATRICIA SCHROEDER, Colorado
DAN GLICKMAN, Kansas
BARNEY FRANK, Massachusetts
GEO. W. CROCKETT, JR., Michigan
CHARLES E. SCHUMER, New York
BRUCE A. MORRISON, Connecticut
EDWARD F. FEIGHAN, Ohio
LAWRENCE J. SMITH, Florida
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
HARLEY O. STAGGERS, JR., West Virginia
JOHN BRYANT, Texas

HAMILTON FISH, JR., New York
CARLOS J. MOORHEAD, California
HENRY J. HYDE, Illinois
THOMAS N. KINDNESS, Ohio
HAROLD S. SAWYER, Michigan
DAN LUNGREN, California
F. JAMES SENSENBRENNER, JR., Wisconsin
BILL McCOLLUM, Florida
E. CLAY SHAW, JR., Florida
GEORGE W. GEKAS, Pennsylvania
MICHAEL DEWINE, Ohio
WILLIAM E. DANNEMEYER, California
HANK BROWN, Colorado
PATRICK L. SWINDALL, Georgia
HOWARD COBLE, North Carolina

M. ELAINE MIELKE, *General Counsel*
GARNER J. CLINE, *Staff Director*
ALAN F. COFFEY, JR., *Associate Counsel*

SUBCOMMITTEE ON CRIMINAL JUSTICE

JOHN CONYERS, JR., Michigan, *Chairman*

DON EDWARDS, California
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JOHN BRYANT, Texas

GEORGE W. GEKAS, Pennsylvania
PATRICK L. SWINDALL, Georgia
HOWARD COBLE, North Carolina

THOMAS W. HUTCHISON, *Counsel*
RONALD A. STROMAN, *Assistant Counsel*
CHERYL A. EPPS, *Assistant Counsel*
RAYMOND V. SMIETANKA, *Associate Counsel*
BENNIE B. WILLIAMS, *Clerk*
PEARL L. CHELLMAN, *Clerk*
CHERYL D. REYNOLDS, *Clerk*

BEST COPY AVAILABLE

CONTENTS

WITNESSES

	Page
Toensing, Victoria, Deputy Assistant Attorney General, Criminal Division, Department of Justice	2
Harjo, Susan Shown, executive director, National Congress of American Indians	8
Prepared statement	13

ADDITIONAL MATERIAL

Herrington, Lois Haight, Assistant Attorney General, Department of Justice, prepared statement	6

APPENDIX

Opening statement of Hon. Jeremiah Denton, a U.S. Senator from the State of Alabama	19
Prevention of Sexual Molestation of Indian Children, testimony of the Navajo Nation	22
Statement of Nancy M. Tuthill, director of the American Indian Law Center, Inc	28
Statement of the Association on American Indian Affairs, Inc	34
Response to questions raised during testimony on H.R. 3826	38

SEXUAL ABUSE OF INDIAN CHILDREN

THURSDAY, JANUARY 30, 1986

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 10:30 a.m., in room 2237, Rayburn House Office Building, Hon. John Conyers (chairman of the subcommittee) presiding.

Present: Representatives Conyers, Edwards, and Boucher.

Staff present: Thomas W. Hutchison, counsel; Raymond V. Smietanka, associate counsel; and Cheryl D. Reynolds, clerk.

Mr. CONYERS. Good morning. The subcommittee will come to order.

Today's hearing is on H.R. 3826, which proposes to amend title 18 of the United States Code to make felonious sexual molestation of a minor an offense within Indian country.

I yield now to the author of this legislation for any remarks he might care to make.

Mr. BOUCHER. Thank you very much, Mr. Chairman. I want to commend you for scheduling this hearing, and I appreciate very much your action in that regard.

This bill seeks to address a problem that has been of increasing concern to Indian tribes, and that is the sexual abuse of Indian children.

Under the present law, when an Indian adult sexually abuses an Indian child in Indian country through crimes such as forcible intercourse, forcible sodomy, incest, or statutory rape, the Major Crimes Act allows the Federal Government to prosecute the offender, but when the sexual abuse takes other forms, the Federal Government cannot prosecute and the State cannot prosecute either. Only the Indian tribal courts would have jurisdiction, and they are very severely limited in the punishment which they can impose. Therefore, even though the conduct would be a felony under the law of the State where the conduct occurs, a tribal court could impose only a maximum of 6 months imprisonment and a fine of $500.

I would point out, Mr. Chairman, that the situation is different if the child is a non-Indian. In that situation, the Federal Government can prosecute using the law of the State to provide the elements of the offense and the maximum punishment. Therefore, in a very real sense Federal law does not protect Indian children to the same extent that it protects non-Indian children where these offenses occur in Indian country.

H.R. 3826 addresses the concern of the Indian tribes and assures that Indian children are protected by the law to the same extent that non-Indian children are protected. The bill amends the Major Crimes Act to permit the Federal Government to prosecute felonious sexual molestation of a minor. The law of the State in which the conduct takes place will supply the definition and the elements of the offense as well as the maximum punishment.

I would like to emphasize, Mr. Chairman, two matters. First, the term "felonious sexual molestation of a minor" is not used in a narrow technical sense to incorporate a State offense only if the State offense has that exact title. Rather, the term is used in a generic or descriptive sense to incorporate the State offense that punishes nonforcible sexual conduct involving children. Therefore, a State may call the offense indecent liberties, for example, and, if so, H.R. 3826 would incorporate that offense under the generic term "felonious sexual molestation of a minor."

I would also like to emphasize that the bill will in no way deprive the Indian tribal courts of jurisdiction. Those courts can continue to try Indians accused of sexually molesting Indian children. There is no impediment to tribal court jurisdiction in the legislation or in the Major Crimes Act, and the Dual Sovereign Doctrine disposes of any claim that tribal court jurisdiction as well as parallel Federal court jurisdiction could constitute double jeopardy.

A bill identical to H.R. 3826 has passed in the Senate, and the Indian tribes are quite anxious that something be done quickly to resolve the problem.

Thank you again, Mr. Chairman, for your prompt action in scheduling this hearing, and I look forward with you to hearing from our witnesses today.

Mr. CONYERS. I thank my colleague.

Our first witness, from the Department of Justice, is Deputy Assistant Attorney General Victoria Toensing, who has worked with the Criminal Justice Subcommittee across the years.

Welcome again to the subcommittee.

TESTIMONY OF VICTORIA TOENSING, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Ms. TOENSING. Good to see you, Mr. Chairman.

Assistant Attorney General Lois Herrington was scheduled to be your witness this morning, but she became ill, and so I am what they call a pinch-hitter. However, I have Criminal Division jurisdiction over the laws on Indian reservations, so I feel I have had batting practice for this testimony.

I would like to tell you right off, Mr. Chairman, that the Department of Justice strongly supports this legislation. We feel that it is necessary. It is intended to fill a gap in the Major Crimes Act, 18 U.S.C. 1153, as it relates to sexual conduct directed at Indian children.

Let me just explain how there is a gap because I always like to get the law down to the basics. The general rule is that under 18 U.S.C. 1152 U.S., criminal laws apply to Indian country. But there is an exception to that within 1152, and that is where an Indian

commits a crime against an Indian. However, 18 U.S.C. 1153 says there is an exception to that exception where there are certain major crimes. Those crimes are specified in 1153. The problem, the gap, is that we do not have any crime listed in 1153 which would cover the sexual molestation of minors. So that is where we are and why we have a gap in the law.

We feel that there has been an increase in incidents of child sexual molestation on Indian reservations, and the fact that many of these cases cannot be dealt with effectively under our statutes leads us to believe that we should amend the statute.

If it is not amended, serious offenses against these children can be prosecuted only in a tribal court which may administer punishment of no more than 6 months imprisonment under 25 U.S.C. 1302(7). We feel that the Federal Government has an obligation to take steps to provide children in Indian country with the same protections as those afforded to the non-Indian children in the rest of that State.

H.R. 3826 would accomplish that objective, and it would ensure an equality of punishment for serious offenses against minors, irrespective of whether the defendant and the victim are Indians or non-Indians.

Currently, State laws provide for more stringent punishment for a non-Indian who commits a crime of sexual molestation of a minor than that 6-month maximum that may be administered when an Indian commits the same crime.

H.R. 3826 adds the offense of "felonious sexual molestation of a minor" to section 1153. This change allows the prosecution under State law in Federal court of an Indian as well as of a non-Indian sexual molester of Indian children in Indian country. The description of the offense as "felonious sexual molestation of a minor" is meant to be generic, as Congressman Boucher just said, so that it would not matter whether the particular State designated its offense as "sexual molestation" or by some other title such as "indecent liberties" or "sexual contact with children." It is a generic term.

In conclusion, let me say that I commend you for having these hearings and for supporting this legislation. We join you in that support, and I will be glad to answer any questions that you have.

Mr. CONYERS. Thank you very much.

Mr. Boucher.

Mr. BOUCHER. Thank you, Mr. Chairman.

Let me pick up on the last point that you made in closing your testimony. I think it is clear that we all want the term "felonious sexual molestation of a minor" to be generic, so that if a particular State does not have an offense with that exact title, we can pick up within that net whatever offense the State does have that is felonious and that involves a sexually related assault against a minor.

Do you think that the way the bill is drafted we are achieving that objective? Is this clearly enough stated that we intend to be generic in our application of this that we accomplish that goal?

Ms. TOENSING. It appears to be so. I do not know if the subcommittee or the committee intends to have a report, but certainly that kind of language can be repeated and stated very succinctly in a report, so there would be no doubt.

Mr. BOUCHER. OK. I am sure we probably will be preparing a report, and we will spell that out very clearly.

Sometimes judges do not feel necessarily bound by what they see in a report. They tend to look at the language, and if it is fairly clear in and of itself, they will interpret it as they see fit. I am just wondering if there is going to be a problem raised by that. But I guess you feel that report language would be sufficient to specify our intent.

Ms. TOENSING. Congressman Boucher, there would be no problem with that because if it is clear on the face of the statute, that is all the further the courts should go. It is only if it is murky in the statute that they look to the report. So if we are clear in the statute and then restate it in the report, I think we are in good shape.

Mr. BOUCHER. All right.

Another possible approach to dealing with this problem is to give Indian tribal courts the authority to impose felony punishments exceeding 6 months, which is the maximum punishment they can impose today. What does the Department of Justice think of that approach?

Ms. TOENSING. We would oppose that, Congressman Boucher, for several reasons. There is a concern on our part about the due process, U.S. constitutional rights that are applicable to all Indians. The tribal courts are not set up in a way that they would give all the guarantees that we are used to in our criminal justice system.

For instance, most of the judges are not law trained. There are no appeals in the tribal system. So there are several problems that would give us great concern in that area.

Mr. BOUCHER. Let me give you a hypothetical situation where an offense occurs on an Indian reservation which has land in two adjoining States. The offense under State law would bear a punishment of 2 years in one State and a punishment of 1 year in the other State.

Assume that the offense occurs on the land that is in the State that bears the 2-year punishment. Would there be an equal protection argument that the defendant could raise because land of this reservation lies within both States and the two States vary in their punishment?

Ms. TOENSING. Having been an in-court prosecutor for 5 years, I know there is always an argument that defense attorneys can raise, but whether they can win it is another matter. We do not see any problem with that. We do not feel that a court would say there was an equal protection problem since it would be no different in practice than a person in one State and a person in another State receiving different sentences for the same crime.

Mr. BOUCHER. I guess the only difference would be that this is an example of Federal law incorporating State law and making a Federal offense of whatever the State defines to be an offense, and the nature of the Federal offense would vary depending upon in which State the crime was committed. But you still do not see that as being an equal protection problem?

Ms. TOENSING. No.

Mr. BOUCHER. OK. Do you see anything in this bill which would serve to divest jurisdiction of the tribal courts? We believe it does

not, but I would like to know whether the Department of Justice agrees with us in that assessment.

Ms. TOENSING. We agree with you, Congressman Boucher. We feel that there would be concurrent jurisdiction so that the Indians could still prosecute or have whatever they call their proceedings that would go to the 6 months, the misdemeanor offense.

Mr. BOUCHER. OK. Thank you very much.

Thank you, Mr. Chairman.

Mr. CONYERS. Mr. Smietanka.

Mr. SMIETANKA. Would you please explain, if you can, how the offense that is added by this legislation relates to an offense already in the Major Crimes Act, namely, carnal knowledge of any female not one's wife who has not attained the age of 16 years?

Ms. TOENSING. That was one of the first questions I asked when I saw the legislation. So we looked at that issue, and it appears that the interpretation of the carnal knowledge of a female provision that is in there really applies to actual sexual intercourse, entering the vagina. It does not cover a situation where perhaps the person is young and so there is no forcible situation where you have a minor not objecting and someone doing a gentle touching of the genital area; it does not include that. The interpretation has always been a sort of forcible rape situation.

Mr. SMIETANKA. In other words, the offense that would be added is somewhat broader in scope than the one that is already in there.

Ms. TOENSING. Yes; it fills that gap.

Mr. SMIETANKA. Would you feel the same reticence about raising the limit on tribal court sentences to, say, a figure of 1 year rather than 6 months?

Ms. TOENSING. Yes.

Mr. SMIETANKA. For the same reasons?

Ms. TOENSING. Yes.

Mr. SMIETANKA. Thank you.

Mr. CONYERS. I appreciate your coming before us on behalf of the Department of Justice. We are going to move the legislation forward as quickly as we can.

Ms. TOENSING. We appreciate that.

Mr. CONYERS. Thank you very much.

Ms. TOENSING. Thank you.

[The prepared statement of Assistant Attorney General Herrington follows:]

Department of Justice

STATEMENT OF

LOIS HAIGHT HERRINGTON

ASSISTANT ATTORNEY GENERAL
OFFICE OF JUSTICE PROGRAMS
U.S. DEPARTMENT OF JUSTICE

BEFORE

THE

HOUSE SUBCOMMITTEE ON CRIMINAL JUSTICE

CONCERNING

H.R. 3826 - LEGISLATION TO AMEND SECTION 1153
OF TITLE 18, TO MAKE FELONIOUS SEXUAL MOLESTATION
OF A MINOR AN OFFENSE WITHIN INDIAN COUNTRY

ON

JANUARY 30, 1986

Mr. Chairman, I am pleased to testify before you today on H.R. 3826, a bill to prevent the sexual molestation of children in Indian country. The Department of Justice strongly supports enactment of this legislation.

H.R. 3826 is intended to fill a gap in the Major Crimes Act, 18 U.S.C. § 1153, as it relates to sexual conduct directed at children. Under the existing Act, section 1153 covers the crimes of rape, involuntary sodomy, and carnal knowledge of a female under the age of 16, when those crimes are committed by an Indian in Indian country. Although the Major Crimes Act was amended last year to add the offense of involuntary sodomy, the Act does not provide adequate coverage for nonforcible sexual conduct involving children. Serious offenses not covered by the Act are various types of sexual contact with male or female children other than carnal knowledge.

Due to the troubling increase in incidents of child sexual molestation on Indian reservations and the fact that many of these cases cannot be dealt with effectively under current statutes, we believe that the Major Crimes Act should be amended to permit improved enforcement of protections against child molestations. If the Act is not amended, serious offenses against children can be prosecuted only in a tribal court, which may administer punishment of no more than six months' imprisonment under 25 U.S.C. § 1302(7).

The Federal government has an obligation to take steps to provide children in Indian country with the same protections as those afforded to non-Indian children. H.R. 3826 would accomplish that objective and would insure an equality of punishment for serious offenses against minors irrespective of whether the defendant and the victim are Indians or non-Indians. Currently, state laws provide for more stringent punishment for a non-Indian who commits a crime of sexual molestation of a minor than the six-month maximum imprisonment that may be administered to an Indian who commits the same crime.

H.R. 3826 adds the offense of "felonious sexual molestation of a minor" to section 1153 of the Major Crimes Act. This change allows prosecution under state law in Federal Court of Indian as well as non-Indian sexual molesters of children in Indian country. The description of the offense as "felonious sexual molestation of a minor" is meant to be generic in nature so that it would not matter whether the particular state designated its offense as "sexual molestation" or by some other title such as "indecent liberties" or "sexual contact" with children.

In conclusion, the Department of Justice believes H.R. 3826 will help protect child victims of sexual abuse through deterrence and punishment of would-be and actual offenders. We are encouraged that the Senate recently approved this type of legislation and we urge this Committee and the full House to give prompt and favorable consideration to H.R. 3826.

Thank you, Mr. Chairman, for the opportunity to appear before your Committee today to speak in support of H.R. 3826 and I will be pleased to respond to any questions.

Mr. CONYERS. Our next witness is the executive director of the National Congress of American Indians, Suzan Shown Harjo. Her statement, like Ms. Toensing's, will be made a part of the record. Welcome.

TESTIMONY OF SUZAN SHOWN HARJO, EXECUTIVE DIRECTOR, NATIONAL CONGRESS OF AMERICAN INDIANS

Ms. HARJO. Thank you.

My name is Suzan Shown Harjo. I am Cheyenne and Creek, and I am a citizen of the Cheyenne and Arapaho Tribes of Oklahoma. As you said in your introduction, I am the executive director of the National Congress of American Indians, which is the oldest and largest national Indian organization.

We are strongly supportive of this amendment. In our prepared statement, we point out that the Bureau of Indian Affairs has reported an increase of nearly 25 percent in Indian child sexual abuse from 1983 to 1984, up from 685 reported cases in 1983 to 932 reported cases in 1984. We are most concerned about this and are very pleased that the Congress is moving so quickly to help stem this tide of increasing incidents in this area.

We feel that the increased punishment, however, is not going to be the solution that will ultimately stem the tide of the increase in this area or cause a decrease in this area. We point out on the second page of our testimony that the Congress' Joint Economic Committee has estimated that a 1-percent increase in the national unemployment rate results in various increases in life conditions—deaths from cirrhosis of the liver, increase in suicides, increase in homicides, 4 percent increase in State prison admissions.

The committee did not project increases in child sexual abuse based on increases in unemployment, but we can imagine that if these other factors are increased when unemployment is increased by 1 percent that the increase in unemployment, the dramatic increase since 1979 to the present on some reservations of more than 15 percent and more than 20 percent, has something to do with this rise that we are seeing in child sexual abuse.

I was pleased to hear the Congressman and the witness from Justice agree that there is concurrent jurisdiction and would be under this amendment. I was displeased to hear the Justice witness' claim that there is insufficient appeals process, insufficiency in the judiciary of tribal court mechanisms or tribal justice mechanisms, whether or not they have actual courts, and that there is less due process in tribal judiciary systems than we find in other places.

I think that the committee should ask the Justice Department to substantiate with empirical data these claims, which I think are just not able to be substantiated at this point.

I would note that on the final page of the Justice testimony there is an interesting view into the due process of the general judiciary system where the Justice Department is saying that this would go far to punish would-be offenders, for example. I thought that was a little odd in the actual prepared statement of the Justice Department. I do not know how a would-be offender can be punished, and we do not have this kind of practice in our tribal justice systems. There is good law—the Indian Civil Rights Act of the late 1960's

and the standing Federal Indian policy that is a respecter of traditional tribal judiciary systems.

We need to point out here, too, that the limitation on tribal court punishing authority is a congressionally imposed limitation that allows Indian tribal courts to punish only to the extent of $500 or 6 months in prison. We feel that that limitation should be lifted by an amendment to title XXV, perhaps through this committee, perhaps by this committee's support through the Interior and Insular Affairs Committee which usually handles Indian affairs issues. We think that that is an important punishing authority for the tribal courts to have, although, as we said earlier, this is not going to be resolved ultimately by punishing the people; this is going to be resolved ultimately by lifting the burdens that the Federal Government in large part has imposed on the Indian population and caused us to be in great survival mode at this time.

Thank you very much for attending to this and moving it.

Mr. CONYERS. Let me compliment you on the real understanding and experience that you bring to this hearing. We are grateful for your testimony.

Could you tell us a little bit about how the tribal courts operate?

Ms. HARJO. I am not the expert on this matter. What I know about—there are some tribal justice systems that mirror the U.S. justice system. The law and policy of the United States is to respect the traditional forms of Indian systems, governance systems, even though they do not mirror, or maybe especially if they do not mirror, the United States, so that some Indian nations depend on their traditional remedies, their traditional justice systems, and are successful in having those justice systems adhered to by the community of interest today.

Many of the Indian tribes, though, have adopted the justice systems that you see in the United States or in their surrounding region. Some have appeals systems.

When I was at the Department of the Interior for 19 months during the previous administration, I was involved in two situations where the tribe and/or tribes could not resolve their matters that were at issue and agreed to have an appeals system for that particular matter of three judges from elsewhere, Indian tribal court judges; they insisted on Indian tribal court judges; and that worked perfectly well.

While there may be some Indian judges who are not law trained, as the witness from the Justice Department described it, I think that the most important thing in Indian country is that the individual who is sitting in judgment be understanding of, knowledgeable about, and sensitive to the things that are important to that community, and the traditions in any given Indian community may be something quite different from the thing that you learn in law school.

I should point out that there are only two law schools in the United States that teach Indian law, as such. You really have to learn that elsewhere even though it involves an entire title of the United States Code.

I would be happy to provide you with some information about tribal courts. There have been numerous studies done. There are several organizations that represent Indian judges, Indian courts;

there are constantly training seminars going on for tribal court advocates, tribal court judges, done by the American Indian Lawyer Training Program in northern California, by the National Indian Justice Center, by the American Indian Law Center at the University of New Mexico. This is not something where justice is administered out of a Cracker Jack box. There is serious attention to the community of interest, serious attention to fairness, due process, in a tribal context, and that may mean something that is very different, and I think it is presumptuous for someone to come in and say that this kind of due process is not what we have as due process, so we reject yours and accept ours. I mean that is what caused the Indian wars.

Mr. CONYERS. Your insights are very valuable to this subcommittee, and we appreciate your comments.

Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman. I agree with your observations on the value of this testimony.

The subcommittee that I chair and that you are a valued member of, Mr. Chairman, had hearings on Federal law enforcement in tribal areas, and most of the Native American witnesses pointed out that they do not want the FBI down there in the reservations, that the FBI will not accept the investigations of the tribal police, that they insist on doing their own investigation; then when someone is arrested they drive them in an automobile maybe several hundred miles to a strange Anglo city where the native American defendant feels very much alone and in an alien atmosphere.

All the recommendations that came to my subcommittee a year or so ago were that we should make every effort to strengthen the tribal courts and the criminal justice system on the reservations.

So I wonder if this bill could be interpreted as going in the other direction, if we are now inviting the FBI to go on to the reservations where they have experienced great difficulty in the past. The FBI testified they did not want this jurisdiction, the kind that we were discussing before in the light of their experience at Wounded Knee and on Big Pine and the other reservations.

So are we increasing the jurisdiction of the Federal police here so that the generally white Anglo FBI agents are going to go in increasing numbers then and saying that the tribal police are incapable of handling crimes such as this?

Ms. HARJO. If there is concurrent jurisdiction, which would mean to me in its broadest sense that all peoples in the area are going to be working together on this particular matter because it is so serious, then I think in a good neighborly sense perhaps it will have been for the good.

The position of the National Congress of American Indians has come from Indian leaders and Indian program people working in the social services on the reservations, and they brought this issue to the convention that we had in Tulsa in October of last year and asked that we take this step.

It did seem inconsistent to some of us at first because of the direction we have been going in, as you say, to strengthen the tribal courts, and that is why we do insist and are sorry to hear the Department of Justice say that they would not support an amendment to title XXV that would increase the punishing authority of

tribal courts in this matter. We think it should be done generally but especially in this matter.

The problem is complex. There is the situation where Federal entities have misread the situation on Indian reservations. There was one incident at Red Lake Reservation when I was at the Department of the Interior where we tried to get the U.S. Marshals to go in and protect the Red Lake Indian community and they would not because they felt that the individuals who would be the victims were Indians, that this was an Indian-against-Indian thing so they should not go in even though our law enforcement people were telling us that by sundown there would be widespread burning, perhaps deaths. There was some 12 hours' notice. Despite all of this, no Federal presence would go in even though they had jurisdiction, and there were several children killed and a great deal of arson, and that is something that should be laid at the feet of the Federal Government.

In some areas it is the U.S. attorney who will not accept from the Bureau of Indian Affairs law enforcement officer or from the tribal law enforcement officer an investigation, that that investigation has to come from the FBI.

One thing that we found out in a brief, superficial survey in 1978 and 1979 was that, in fact, some U.S. attorneys are taking the direct investigations from the BIA and tribal police, only they do not know it; it is signed by the FBI; and that there are problems with geography, where the FBI office is 200 miles away. You do have problems with getting people to hearings, problems with speedy investigations.

There are enough logistical problems to really try to work out some of them, make sure that everyone is equally trained, for one thing.

A constant complaint that we hear is that people are not trained—BIA and tribal police are not trained as well as they might be; make sure everyone goes through roughly the same kind of training system, and look at those places where the law enforcement and justice systems are working on those reservations, and try to see why.

There are some areas of Federal unresponsiveness that we can lay right to the feet of an anti-Indian bias, especially where the Indian is the victim, less so when the Indian is not the victim.

The issue is complex, and I do not think there is one single answer to it.

Mr. EDWARDS. That is very helpful. Thank you.

Thank you, Mr. Chairman.

Mr. CONYERS. Mr. Boucher.

Mr. BOUCHER. Thank you, Mr. Chairman.

I would only ask if you are aware of any Indian tribes that may be in opposition to this bill. Everything we have heard so far is supportive. Are you aware of any opposition among the Indian community or elsewhere?

Ms. HARJO. I am not aware of any opposition. None has been called to my attention. Everyone who has contacted me—I mentioned how this came about, as an expression from our convention which had represented 126 governments, Indian and native governments. I have not heard from any of the others that this is not a

good thing to do. I know the Blackfeet Tribe and the Fort Peck Tribes are most supportive of this and sent several people from a group called Voices for Children to advocate for this at the time of the hearing in the Senate on this bill.

Mr. BOUCHER. That is fine.

Ms. HARJO. If there are, I do not know of them.

Mr. BOUCHER. That is good. Thank you very much.

Thank you, Mr. Chairman.

Mr. CONYERS. You have been a most valuable asset to us in discussing this legislation. We are grateful for your coming. Thank you again.

Ms. HARJO. Thank you.

[The prepared statement of Ms. Harjo follows:]

Prepared Statement of Suzan Shown Harjo

Mr. Chairman and Members of the Committee, on behalf of the Indian and Native governmental and individual members of the National Congress of American Indians (NCAI), I thank you for providing this opportunity for us to express our strong support for enactment of H.R. 3826.

The NCAI is the oldest and largest natonal Indian organization, with standing membership resolutions over its 41-year history from more than 75% of the Indian and Native governments. At our recent 42nd Annual NCAI Convention in Tulsa, Oklahoma, October 7-11, 1985, there were 126 Indian and Native governments officially represented by duly-authorized delegates with voting privileges, along with more than 1,000 Indian and Native individual voters.

Our Convention adopted the appended resolution, which was included in the Congressional Record of November 1, 1985 (at S14688 and S 14689) by Senators Denton and DeConcini when introducing S. 1818, the companion legislation to H.R. 3826. We are most appreciative of the bi-parsian support for this legislation.

H.R. 3826 would allow prosecution in federal court, using state statutes, for non-forcible sexual conduct involving Indian and Native children. At present, tribal courts can administer punishment for up to six months imprisonment, a punishment we consider to be too lenient for the heinous crime of sexual abuse of children. We urge the Committee also to amend the Indian Civil Rights Act, 25 USC 1302(7), to enlarge the penalty and punishment power of tribal courts to imprisonment for a term of one year or a fine of $1,000, or both. There have been intances where meritorious cases have not been investigated and brought by the Federal Bureau of Investigation and the U.S. Attorneys, and we wish for tribal courts to have punishing authority more equal to this crime, especially in those instances where the federal entities are unresponsive.

We further urge the Committee to add a proviso to H.R. 3826 to the effect that nothing in this act shall be construed to preclude the tribal jurisdiction over these offenses. It is unresolved as to whether the tribal courts can hear Major Crimes, although we believe they have this authority, and we wish to assure that this amendment to the Major Crimes Act is not prohibitive prospectively. Tribal courts clearly can hear lesser included offenses and, for example, can sentence offenders to multi-year counselling and can impose punishment suited to the community of interest, which many experts in this field view as the more productive determent and rehabilitation course.

The Bureau of Indian Affairs reports an increaseof nearly 25% in Indian child sexual abuse from 1983 to 1984, up from 685 reported cases in 1984 to 932 reported cases in 1984. Evidence of the increasing public recognition of the rising incidence of sexual abuse of Indian and Native children is to be found in the escalating number of local and natioeal forums on the prevention and recognition of sexual abuse. The National Indian Health Board has included as an important part of its agenda for the past several years the issues surrounding sexual abuse of children. We also see increasing attention being given to child sexual abuse

59-180 O - 87 - 2

BEST COPY AVAILABLE

issues in tribal newspapers.

While the authors of this legislation are to be congratulated for their concern and for the introduction of H.R. 3826, we hope that all understand that more stringent punishment of sexual abusers will not end this type of activity. These crimes are rooted in myriad complex social circumstances which have led to disintegration of many Indian and Native families, to cultural alienation, to levels of Indian unemployment exceeding 55% nationally and exceeding 90% on some reservations, to the alarmingly high rate of suicides among Indian youth which is 2.3 times that of the national average and to the high rate of alcoholism among Indian and Native people.

Indian and Native children are a vulnerable population with regard to sexual abuse, which runs counter to all tribal mores, but which is found in modern conditions. Factors which contribute to a child's potential as a victim of abuse include dysfunctional families, alcoholic parents, violence in the home, and low self-esteem. The 1980 Census reports that Indian and Native people have an alcoholism rate 451% higher than the non-Indian population. In addition to the need to address root causes of sexual abuse, more resources need to be devoted to the identification of children who have been abused and to assistance for these children.

The Joint Economic Committee has estimated that a 1% increase in the national unemployment rate results in a 1.9% increase in deaths from cirrhosis of the liver, a 4.1% increase in suicides, a 5.7% increase in homicides and a 4% increase in state prison admissions. That Committee did not project increases in child abuse based on increases in unemployment, but it is reasonable to expect that an increase does result. The national unemployment rate dropped 27% from 1982 to 1985, but the Indian unemployment rate rose 7% during the same period, according to the Department of Labor and Bureau of Indian Affairs statistics. This, in our opinion, has contributed to the increase in sexual abuse among Indian and Native children. If, as the National American Court Judges Association reports, sexual abuse of Indian children occurs at about the same rate as sexual abuse of non-Indian children, this would mean that one out of four girls and one out of sex to eight boys are sexually molested by age 18, with 85% of the identified children being abuse on a reoccurring basis by someone known to them.

Passage of H.R. 3826, with the recommended amendment and proviso, would protect some children by providing more appropriate punishment for sexual abusers and would contribute to the public discussion and community involvement in the prevention of sexual abuse of children. We urge swift enactment to help stem the tide of the increasing incidents of Indian and Native child sexual abuse. We thank the Committee for its expeditious action.

BEST COPY AVAILABLE

Ceausescu's attempts to become a world leader, only Moscow may veto.

Most dangerous to the U.S. and the West is the integration of the Romanian secret service within the Soviet bloc intelligence services. To be sure, the Romanian CIA no longer has totally access to Moscow. But General Pacepa reports that the CIA has extensive ties to the Soviet KGB. Experts believe that the CIA is a very important ally in the KGB's espionage network, including inside the U.S. In addition, the CIA has contacts, comparable with the Hungarian, Yugoslav, and Bulgarian secret services for smuggling high technological commercial and military equipment into Romania and for sending arms and arms abroad. In 1977 and 1978 alone, the Romanians sold Western companies more than 200 pounds of narcotics."[8]

Romania's voting record at the U.N. is cited by some State Department officials as an example of Bucharest's independence from Moscow. In 1985, for example, while the U.S. and Soviet Union voted together 13.5 percent of the time in the General Assembly, Romania voted with the U.S. 14.3 percent of the time. But in 1984, Moscow actually voted with the U.S. 13.3 percent of the time compared to 10.1 percent for Romania.

In view of its growing economic dependence on the Soviet Union, Romania can be expected to use the Moscow line even more servilely. Comecon has been seeking increased fuel supplies from the Soviet Union. Radio Free Europe researcher Paul Gofton notes that Moscow "seems to be maintaining a deliberate gap between its oil exports and Romania's expectations in this domain, an obvious economic lever aimed at influencing Romania's regional behavior." [9]

The Soviet presence in Romania, meanwhile, apparently is mounting. Reports Ambassador Funderburk:

Our guys observed a large Soviet presence in Romania that was not welcomed even by some officials in Washington. On our own initiative, we looked in registries, checked schools, toured known places and came up with an unlikely number of resident Soviets, including Soviet agents in fraternity membership Romanian experts to the Soviet Union."

Funderburk also cites evidence that Romania has transferred to the Soviet Union technology obtained from the U.S. This is confirmed by Commerce Department officials.

CONCLUSION

At one time, it might have made sense for the U.S. to grant favors to Romania in the hopes of getting something in return. For a decade, the U.S. has wasted its opportunity for Bucharest to live up to its end of the deal. Instead, Romania remains profitably Eastern Europe's most favorable nation—except for the USSR. Romanian leaders richly are generously rewarded, and cooperation is rigidly restricted. Particularly in Romania there are parallels to corruption and betrayal of political decades, instances of vacillating congressmen and reckless bureaucrats, and a fraudulent conviction record that includes a large number of Soviet spies, criminals, and agents of the secret police.

Romania's maverick and "independent" role in foreign affairs, meanwhile, is a charade. The Romanian secret service, its high technology espionage efforts, its illegal drug trafficking efforts, are all closely integrated with the KGB. Many of Romania's actions, moreover, directly benefit Moscow, including its attempts to involve the Soviet Union in Middle East negotiations and the reported transfer to the Soviet Union of high technology obtained from the U.S.

As such, the U.S. should start treating Romania as the hard-line Stalinist state that it is. Washington should not endorse the Ceausescu regime by giving it the gift of Most Favored Nation trade status. To deny MFN to Romania would signal to the Romanian government that the U.S. no longer is fooled and no longer will encourage Bucharest's repressive internal policies and foreign policy distortions.

JOSEPH CHARLES PEARE, Ph.D.,
Senior Policy Analyst.

By Mr. DENTON (for himself and Mr. DeCONCINI):

S. 1813. A bill to prevent the sexual molestation of children in Indian country; to the Committee on the Judiciary.

PREVENTING THE SEXUAL MOLESTATION OF CHILDREN IN INDIAN COUNTRY

Mr. DENTON. Mr. President, I rise today, along with my distinguished colleague from Arizona, Senator DeCONCINI, to introduce a bill to prevent the sexual molestation of children in Indian country.

Specifically, the bill is designed to fill a gap in the Major Crimes Act, 18 U.S.C. 1153, with regard to serious sexual conduct directed at children. Currently, section 1153 reaches the crimes of rape, involuntary sexual, and carnal knowledge of a female under the age of 16, when those crimes are committed by an Indian in Indian country. Although recently amended by Public Law 98-473 to add the offense of involuntary sodomy, the statute still lacks adequate coverage of nonferenible sexual conduct involving children.

Serious offenses that are not covered include various types of sexual contact with male or female children other than carnal knowledge. Many U.S. attorneys have reported a troubling increase in incidents on Indian reservations. Amendment of the Major Crimes Act is necessary to permit effective enforcement, since without the amendment these serious offenses, which nearly all States treat as felonies, are prosecutable only in a tribal court, which may administer punishment only up to 6 months' imprisonment according to 25 U.S.C. 1302(7).

Moreover, amendment of the Major Crimes Act is necessary to increase the protection for children on Indian reservations and to equalize the punishment for such crimes between Indian and non-Indian offenders. A non-Indian who commits the crime of sexual molestation of a minor in Indian country is punishable under the far more stringent provisions of State law, either in State court when the victim is a non-Indian, or in Federal court by assimilation under 18 U.S.C. 1152 when the victim is an Indian.

The bill adds the offense of "felonious sexual molestation of a minor" to section 1153, thus permitting State law to be used in Federal court to prosecute Indian as well as non-Indian sexual molesters of children in Indian country. The description of the offense as "sexual molestation of a minor" is, like the recent addition of "involuntary sodomy," meant to be generic in nature. Thus, it would not matter whether the particular State denominated its offense as "sexual molestation" or by some other title such as "indecent liberties" or "sexual contact" with children.

So long as the State has on its books a felony offense that proscribes the conduct of nonferenible sexual abuse of the person of a minor, also as defined by State law, that offense will be incorporated into section 1153. The offense must, however, be a felony. This qualification ensures that, as with all other offenses in section 1153, only the major varieties of the offense will be subject to Federal jurisdiction, maintaining exclusive tribal jurisdiction over the lesser offenses.

Mr. President, as the U.S. Supreme Court noted in the famous case of New York versus *Ferber*, "the prevention of sexual exploitation and abuse of children constitutes a Government objective of surpassing importance." It is with that objective in mind that Senator DeCONCINI and I introduce this bill to prevent the sexual molestation of children in Indian country and to give these children the same protections enjoyed by non-Indian children.

The bill has the strong endorsement by the National Congress of American Indians, as indicated by a resolution adopted at their recent annual meeting. The bill is also endorsed by the Alabama Indian Affairs Commission and the U.S. Department of Justice.

I ask unanimous consent that the text of the bill and the resolution by the National Congress of American Indians be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 1813

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1153 of title 18, United States Code, is amended by inserting "felonious sexual molestation of a minor," after "involuntary sodomy," each place it appears.

RESOLUTION NO. T-85-45/E

NATIONAL CONGRESS OF AMERICAN INDIANS

A resolution urging Congress to amend the Major Crimes Act by adding the crime of child sexual molestation.

Whereas, recognition of Child Sexual Abuse Problems on Indians Reservations and Alaskan Natives is an important initial step in facing and taking steps to resolve this pervasive social problem; and

Whereas, Child Sexual Abuse situations disrupt families and causes serious and permanent psychological damage to Indian children; and

Whereas, Tribal Social Services Offices, Tribal Prosecutor's Offices, and the Bureau of Indian Affairs and Tribal Law Enforcement Offices, must cooperate to fully pros-

BEST COPY AVAILABLE

crime persons committing child sexual abuse crimes on Indian Reservations; and

Whereas, at the present time many Tribes do not have specific Child Molestation laws in their criminal codes and if an Indian is convicted of child sexual molestation, the maximum penalty available in Tribal Courts is six months incarceration, a five hundred dollar fine, or both; and

Whereas, an Indian committing a child molestation crime which is not considered Rape, Assault with Intent to Commit Rape, or Incest may not be charged with a federal Major Crime pursuant to 18 U.S.C. 1153; and

Whereas, it is necessary and crucial to effective law enforcement on Indian Reservations and to protect the mental health and physical well-being of Indians to have the United States Congress enact into law as part of the Major Crimes Act Molestation Act.

Now therefore be it resolved:

1. The National Congress of American Indians hereby urges the United States Congress to enact into law an amendment to the Major Crimes Act, 18 U.S.C. 1153, making child molestation by an Indian to an Indian child comprise on an Indian Reservation, a federal crime justiciable in the federal courts and providing the federal courts the power to punish Indian offenders.

2. The National Congress of American Indians hereby urges the United States Congress to enact into law an amendment to the Indian Civil Rights Act, 25 U.S.C. § 1302(7), enlarging the penalty and punishment power of tribal courts to imprisonment for a term of one year or a fine of $5,000, or both.

3. The National Congress of American Indians hereby authorizes its duly elected officers to take all appropriate steps to urge Indian Tribes, Indian organizations, the Bureau of Indian Affairs, the Department of Justice, and the United States Congress to support amending the Major Crimes Act to include the crime of Child Molestation.

By Mr. LEAHY:

S. 1821. A bill entitled the "Nuclear Waste Reform Act of 1985"; to the Committee on Environment and Public Works.

NUCLEAR WASTE REFORM ACT

• Mr. LEAHY. Mr. President, I would like to introduce today the Nuclear Waste Reform Act of 1985. This legislation will make major changes in our existing nuclear waste policies.

I will also introduce in the CONGRESSIONAL RECORD at this point testimony I delivered before the Environment and Public Works Committee which explains this legislation and provides background information on why it is being introduced, and I ask unanimous consent that the testimony be printed in the RECORD.

There being no objection, the testimony was ordered to be printed in the RECORD, as follows:

TESTIMONY OF SENATOR PATRICK J. LEAHY BEFORE THE ENVIRONMENT AND PUBLIC WORKS COMMITTEE ON THE NUCLEAR WASTE POLICY ACT OF 1982, OCTOBER 30, 1985

Before I begin to discuss my views on the Nuclear Waste Policy Act, I want to thank the Chairman of the Committee, my colleague from Vermont, Bob Stafford, for scheduling these hearings. As he knows, the Department of Energy's nuclear waste program has been very controversial in Vermont. Hundreds of Vermonters have turned out at meetings throughout the state on the Department's plans.

It will be no surprise to the Senators here today to learn that many strong feelings were expressed in these meetings. But these meetings did much more than vent feelings. Many of the speakers raised fundamental questions about the wisdom and fairness of the present radioactive waste program. The concerns raised by these Vermonters have made it clear to me that the Nuclear Waste Policy Act needs to be thoroughly reviewed by the Congress. Two broad issues need to be addressed.

First, has the Department of Energy implemented the Nuclear Waste Policy Act as Congress intended?

Second, does the Nuclear Waste Policy Act need to be fundamentally altered?

I urge the Committee to address each of these issues. I have come to the conclusion that the only way to be fundamentally assured that the Department has not implemented the existing act in a manner that should be accepted by the Congress.

The Nuclear Waste Policy Act had two basic purposes. The first was that the Congress must establish a program to dispose of nuclear wastes quickly. This urgency stemmed because the lack of a demonstrated method of radioactive waste disposal threatened the viability of nuclear power. The United States, Indeed, at the time the act was being written, the Supreme Court was considering whether to overturn the California statute, which conditioned the expansion of nuclear power on the demonstration of such a solution. The nuclear industry viewed the passage of the Nuclear Waste Policy Act as part of an effort to win that lawsuit and overrule the California statute.

The second purpose of that legislation was that the radioactive waste problem was a political problem and not a scientific one. Thus, it was necessary to create a system that would overcome the political obstacles through deadlines and similar mechanisms. It was assumed that an acceptable geological site could be found.

I do not agree with either of these premises. When the Congress wrote nuclear waste legislation, I believe that its purpose should be the health and safety of the American people. I believe that the determination of whether or not a safe geological site can be found for nuclear waste is a matter that must be solved by scientific research and not legislative fiat.

Let me give three examples of how the premise that the nuclear waste disposal problem must be solved quickly has created an unsound and unfair process.

The act requires that the second set of repositories be chosen by 1990. Now this may seem like a long time. However, when you start to realize, as the Department of Energy now does, all the work that has to be done to make such a decision, it becomes a very short time. DOE has already delayed the deadline by two years. Because of the time pressures built into the act, the Department of Energy had to choose at least for the second repository where it had already completed an final geological survey. Its completed studies had only looked at eastern granite. Therefore, in its search for new candidates for the second round of sites, it only looked at crystalline rocks (granite) east of the Mississippi. In making this arbitrary decision only to look at granite east of the Mississippi, it ignored two-thirds of the granite deposits in the United States. Then in limiting the candidate areas to crystalline rock it ignored the data about to crystalline rock. It ignored the huge areas of shale that it now believes may be acceptable repositories. Why did it not look at these other types of rocks? Because it did not know enough about shale when it began the second round process.

If the Nuclear Waste Policy Act were written on the premise that it is more important to find a safe site than it is to find a site soon, the process would be very different. All of the various possibilities for geological disposal would have been thoroughly researched first, and then the entire United States would be searched for candidate sites.

The time pressure to find a nuclear waste dump has created other problems as well. In section 960.3-2-1 of the regulations, it states: "To identify a site as potentially acceptable, the evidence shall support a finding that the site is not disqualified in accordance with the qualification requirements set forth in Appendix III of this part." This is completely backwards. Ignorance is not bliss. A site should only be considered acceptable if the evidence shows that it is acceptable.

Think of a small town in Vermont that believes that its granite has severe structural problems that would make it an unsafe place to dump U.S. Should hundreds of thousands and possibly millions of dollars to research definitely whether or not the fault exists. But under the Department of Energy's regulations, the town bears the burden and the cost of proving that it is not an acceptable site.

Why does DOE not bear the burden of proof? Because if it did, the whole process would be brought to a standstill.

The cries to find an acceptable radioactive waste site quickly has also meant that the environmental safeguards usually available to protect citizens from arbitrary and unwise governmental actions have been circumvented. Normally if citizens and states believe that an agency is proceeding unfairly, they can use the environmental impact process and the courts to protect their rights and force the agency to address their concerns. However, the Nuclear Waste Policy Act has been written so that environmental impact assessments, and probably court action, are precluded until very late in the process. This has meant the process go more quickly, but it also means that the process may very well be substantially unsound and fundamentally unfair.

I hope that the Committee will consider the issues that I have raised this morning. I hope it will carefully examine both the provisions of the Nuclear Waste Policy Act and its implementation.

In order to assist the Committee in this endeavor, I will be introducing legislation today which proposes several changes in the act. Some of these changes are generic. Others speak directly to how the Department's regulations have been implemented in Vermont.

First, the Area Recommendation Report, which will narrow the candidate list this fall from over 200 to 15 or 20 sites should be subject to the full NEPA process and court review.

Second, section 113(b)(1)(A) should be amended to require DOE to examine all potential disposal sites wherever they exist in the country.

Third, section 960.3-2-1 should be changed to require that sites not chosen as priority sites for round two should be eliminated from consideration for twenty-five years. This will free communities from the cloud created by existing regulations.

Fourth, the existing regulations must be amended to place the burden of proof to develop the evidence needed to show that a site is qualified on the Department of Energy, and not on the local town to prove that it is disqualified.

Fifth, several of my colleagues in the House and the Senate have pointed out that

BEST COPY AVAILABLE

Mr. CONYERS. There being no further business before the subcommittee, it stands adjourned.

[Whereupon, at 11:05 a.m., the subcommittee was adjourned, subject to the call of the Chair.]

APPENDIX

OPENING STATEMENT BY THE HONORABLE JEREMIAH DENTON, U.S.S.
BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON CRIMINAL JUSTICE
ON S. 1818, A BILL TO PREVENT THE SEXUAL MOLESTATION
OF CHILDREN IN INDIAN COUNTRY

Mr. Chairman:

I thank you for giving S. 1818 expedited consideration, thereby recognizing the urgent need to provide further protection to our Indian children. I also thank Congressman Boucher for his able assistance in sponsoring H.R. 3826, the companion to S. 1818.

As you know, S. 1818, which Senator Dennis DeConcini and I introduced on November 1, is designed to fill a gap in the Major Crimes Act, 18 U.S.C. 1153, with regard to serious sexual conduct directed at children. Currently, section 1153 reaches the crimes of rape, involuntary sodomy, and carnal knowledge of a female under the age of sixteen, when those crimes are committed by an Indian in Indian country. Although recently amended by P.L. 98-473 to add the offense of involuntary sodomy, the statute still lacks adequate coverage of non-forcible sexual conduct committed by an adult on children.

Serious offenses that are not now covered include various types of adult sexual contact with male or female children other than "carnal knowledge." Many United States Attorneys have reported a troubling increase in incidents on Indian reservations. Amendment of the Major Crimes Act is necessary to permit effective enforcement, since without the amendment these serious offenses, which nearly all States treat as felonies, are prosecutable only in a tribal court, which may administer a maximum punishment of up to only six months imprisonment and/or a fine of $500, according to 25 U.S.C. 1302(7).

The previous numbered page in the original document was blank.

Moreover, amendment of the Major Crimes Act is necessary to increase the protection of children on Indian reservations and to render more similar the punishment for such crimes between Indian and non-Indian offenders. A non-Indian who commits the crime of sexual molestation of a minor in Indian country is punishable under the far more stringent provisions of State law, either in State court when the victim is a non-Indian, or in Federal court by assimilation under 18 U.S.C. 1152 when the victim is an Indian.

The bill adds the offense of "felonious sexual molestation of a minor" to section 1153, thus permitting State law to be used in Federal court to prosecute Indians as well as non-Indian sexual molesters of children in Indian country. The description of the offense as "sexual molestation of a minor" is, like the recent addition of "involuntary sodomy," meant to be generic in nature. Thus, it would not matter whether the particular State denominated its offense as "sexual molestation" or by some other title such as "indecent liberties" or "sexual contact" with children.

So long as the State has on its books a felony offense that proscribes the conduct of non-forcible sexual abuse of the person of a minor, also as defined by State law, that offense will be incorporated into section 1153. The offense must, however, be a felony. This qualification ensures that, as with all other offenses in section 1153, only the major varieties of the offense will be subject to Federal jurisdiction, maintaining exclusive tribal jurisdiction over the lesser offenses.

In testimony on November 19, 1985, by Lois Haight Herrington, Assistant Attorney General, Office of Justice Assistance, U.S. Department of Justice, before the Senate Judiciary Committee, Mrs. Herrington stated that this amendment, in conjunction with the offenses currently listed in the Major Crimes Act, would cover any and all defined serious sexual offenses against Indian children by Indians. Mrs. Herrington also offered the Department's strongest endorsement of the bill.

The bill was also endorsed at the November 19 hearing by Ms. Suzan Shown Harjo, Executive Director of the National Congress of American Indians, who saw it as necessary to fight the increase of nearly 25 percent in Indian child sexual abuse from 1983 to 1984, up from 685 reported cases in 1983 to 932 reported cases in 1984. The bill was also endorsed through written testimony submitted at the hearing by the Assiniboine and Sioux Tribes of the Fort Peck Reservation in Montana and by the American Indian Law Center. Finally, the bill is also endorsed by the Bureau of Indian Affairs of the U.S. Department of the Interior.

As the United States Supreme Court noted in the famous case of New York v. Ferber, "the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." It is with that objective in mind that Congressman Boucher, Senator DeConcini and I introduced legislation to prevent the sexual molestation of children in Indian country.

Mr. Chairman, I urge the Subcommittee to report this bipartisan bill to the full Ccommittee.

Thank you, Mr. Chairman, for your courtesy in allowing me to testify today.

Testimony
of the
Navajo Nation
before the
House Committee on the Judiciary
Subcommittee on Criminal Justice
on
H.R. 3826 - Prevention of Sexual Molestation
of Indian Children

Mr. Chairman, members of the Committee, we thank you for this opportunity to express our views on H.R. 3826. The frequency of reported incidents of child sexual abuse within the Navajo Nation is increasing at a rate similar to that found throughout the country. Unfortunately, the ability of the Navajo Nation to provide appropriate criminal sanctions in such cases is restricted by federal laws which place sentencing limitations upon Tribal governments. The Navajo Tribal Code provides criminal sanctions for many types of child sexual abuse, however, the maximum sentence for such crimes is six months in Tribal jails. At present the federal Major Crimes Act fails to provide sanctions for those instances of sexual abuse which do not fall within the categories of rape, forceable sodomy or unlawful carnal knowledge of a female under the age of 16. The jurisdiction of the states does not extend to the reservation.

The result of this situation is, quite simply, that Indian children residing on reservations are not accorded the same protections as other American children.

The protective services offered through Social Welfare programs do not provide adequate protection. This gap is illustrated by the experiences of social workers throughout the Navajo Nation. Often social workers encounter situations of child sexual abuse. While they are in many instances able to provide immediate assistance to the child such as temporary foster care, the only long-range solution is permanent removal of the child from the situation since offenders are not removed from the community. In the event the abuser is a parent, termination of parental rights actions may be commenced to permanently remove the child from the home. Such actions are not always successful nor appropriate, where only <u>one</u> parent is responsible for the abuse both the non-abusing parent and the child are penalized by removal. Where the abuser is a non-family member virtually nothing can be done aside from tribal prosecution which, if successful, removes the offender for only up to six months. Social worker referrals to prosecuting authorities are for the aforementioned reasons virtually ineffective. Child protective services workers feel frustrated by the lack of protection which permits an abuser to remain in the community or a continual threat if not physically, then phychologically, to the abused child, and the community.

H.R. 3826 attempts to remedy this situation by providing the same protection to Indian children that their state counterparts receive. As the Congress has recognized in the Indian Child Welfare Act, children are our greatest resource and their protection is of paramount importance to the future of not only the Navajo Nation, but the future of America. While there is an obvious necessity for the inclusion of "non-forceable sexual abuse" in the Major Crimes Act, 25 U.S.C. Sec. 1153, H.R. 3826 is not, as written, without faults. Two specific issues must be addressed: (1) The definition of the term "sexual molestation of a minor" in determining which legal standards are applied and (2) The impact on the Navajo Nation resulting from the disparities in legal standards between, Arizona, New Mexico and Utah. These issues are dealt with sequentially below.

(1) Definition: The use of the term "felonious sexual molestation of a minor" may be both overly broad and susceptible to widely varying interpretation. For example, the Utah Criminal Code, U.C.A. Sections 76-5-402.1 and 402.3 are special provisions proscribing "Rape of A Child" and "Object Rape" of a child both of which while distinguishable from 18 U.S.C. Section 1153's definition of rape and carnal knowledge overlap with the Major Crimes Act to the extent

that 18 U.S.C. Section 1152 may make them applicable. Utah also proscribes "Sodomy on a Child," a non-forceable crime, U.C.A. Section 76-5-403.1 as well as forceable sodomy. Utah also has criminal sanctions against "Forceable sexual abuse" U.C.A. Section 76-5-404 and "Sexual abuse of a child" U.C.A. Section 76-5-404.1. In each of the above sets of statutes, those punishable acts against "children" which do not require force define children as persons under 14 years of age. "Molestation" is not included in their definitions. The sentencing scheme of the Utah Criminal Code is both elaborate and complex providing for various enhancement possibilities (e.g. use of a firearm of prior felony conviction involving use of a firearm) as well as requiring imposition of a maximum sentence dependent on the existence or non-existence of mitigating or aggravating factors. H.R. 3826 does not define how sentencing in accordance with state law is to be accomplished.

New Mexico and Arizona have equally complex statutory schemes providing for forceable and non-forceable sexual abuse, rape, sodomy against children and other persons. It is unclear how or whether H.R. 3826 would incorporate these laws. Further, a disparate impact occurs depending on whether the acts charged are against females, and would thereby fall within unlawful carnal knowledge of a female

under 16 as well as for example, rape of a child or sexual abuse of a child, or against males, whether no federal statutory proscription is applicable and state provisions only proscribe the conduct as against children 14 years of age or under.

(2) Variable Impact on Navajos depending on which "state" law is applicable. In 1982 the application of a state definition and punishment of incest under 18 U.S.C. Section 1153 was unsuccessfully challenged by two Navajos convicted thereunder based upon Arizona law. U.S. v. Yazzie, 69 F.2d 102 (1982). In Yazzie, the defendants challenged the application of the state definition to them because the conduct while constituting incest in Arizona would not be a crime in New Mexico. Thus, the same conduct could be engaged in on the New Mexico portion of the reservation, without sanction. The 10th Circuit in rejecting the Yazzie's equal protection claim emphasized that the disparate results in application of the law of the states was based upon geographical location and not race. Unfortunately, while the court, in a footnote, recognized that Indians enjoyed a distinct "political" as opposed to "racial" classification, the Court did not consider the implications of applying diverse state laws on a distinct political entity. The use of various laws and sentencing

alternatives adversely impacts on Tribal Sovereignty in that Tribal members who are reservation residents are treated differently under the various state laws. For this reason, the bill should be amended to impose uniform federal standards. This could be accomplished by the inclusion in Title 18 of a comprehensive definition that would apply regardless of the geographical location. This would allow for uniformity of application within the Navajo Reservation and amongst those Indians otherwise subject to federal and not state jurisdiction.

Mr. Chairman, we thank you for your hard work and effort on this issue. We are prepared to work closely with you and your staff. We also thank you for this opportunity to present our views.

STATEMENT OF NANCY M. TUTHILL, DIRECTOR OF THE AMERICAN INDIAN LAW CENTER, INC. OF ALBUQUERQUE, NEW MEXICO, TO THE SUBCOMMITTEE ON CRIMINAL JUSTICE OF THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES ON H. 3826, A BILL TO AMEND SECTION 1153 OF TITLE 18, UNITED STATES CODE TO MAKE FELONIOUS SEXUAL MOLESTATION OF A MINOR AN OFFENSE WITHIN INDIAN COUNTRY

January 29, 1986

Mr. Chairman, I am pleased to provide this testimony on H. 3826, a Bill to Amend Section 1153 of Title 18, United States Code to Make Felonious Sexual Molestation of a Minor an Offense Within Indian Country. The American Indian Law Center strongly supports enactment of legislation which will provide federal jurisdiction to prosecute perpetrators of child sexual abuse in Indian country.

The American Indian Law Center is the oldest Indian legal institution in the United States. It was established in 1967 to encourage the development of political, administrative, and leadership capabilities of tribal governments. An Indian-controlled, non-profit corporation, the Law Center provides broad-based services in legal research, policy analysis, and technical assistance to American Indian tribes, organizations and individuals, as well as governmental agencies at all levels. Since 1971, the Law Center has specialized in issues related to

Indian children and for nearly a decade, we have focused on child abuse and neglect in Indian country.

In addition to children's issues, we have also spent a number of years tackling the problems surrounding the criminal justice system in Indian country. For example, as staff to the Commission on State-Tribal Relations, we sponsored the National Conference on the Indian Criminal Justice System in Denver, Colorado, in September, 1985. At this conference, the participants reinforced our concerns regarding problems with investigation and prosecution of crimes in Indian country, e.g., child sexual abuse. The problems with investigation and prosecution of child sexual abuse are similar to the problems existing throughout the Indian criminal justice system and cross cut several disciplines, and federal and tribal agencies.

I firmly believe that a crisis may erupt in Indian country if the federal government does not initiate legislative and administrative changes to the current method of identifying and prosecuting perpetrators of child sexual abuse. From my organization's work, it is clear that there is a serious problem in prosecuting the perpetrators due to jurisdictional impediments in federal law, as well as in identification of abused children, reporting requirements, investigation procedures and treatment.

Tribes throughout the country are confronted with a host of jurisdictional and enforcement problems. For example, in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), the

Supreme Court ruled that Indian tribes have no criminal jurisdiction over non-Indians. Therefore, tribes are powerless to prosecute non-Indian perpetrators who physically or sexually abuse Indian children on reservations. While tribes can still entertain a civil cause of action against a non-Indian perpetrator for child physical or sexual abuse, the cause of action is in tort, the remedy is in damages and the collection of damages is very difficult.

The problems are not limited to non-Indian perpetrators, however. The prosecution of child abuse cases involving Indian perpetrators and Indian child victims in tribal court is also fraught with barriers. While the tribal courts have both criminal and civil jurisdiction over Indians, the criminal penalties available are limited by the Indian Civil Rights Act of 1968 to a fine of up to $500 and/or six months incarceration. However,the tribal court's power to sentence an Indian perpetrator, even up to six months incarceration, is meaningless and serves only to punctuate the injustice visited upon the child because, in reality and practice, many tribes do not have the facilities nor adequate funds to incarcerate a convicted perpetrator.

The alternative to prosecuting Indian perpetrators in tribal forums, referring the case to the U.S. Attorney's office for federal prosecution, currently presents yet another barrier: federal jurisdiction is grounded in the Major Crimes Act. The federal courts have jurisdiction in Indian perpetrator-Indian

victim child sexual abuse cases only when the perpetrator has allegedly committed one of the crimes specifically enumerated in the Act. This limited jurisdiction is further stunted by proof and evidentiary problems, and the discretionary power of the U.S. Attorney's office to decline prosecution of the case. H. 3826 would ease the situation considerably by creating federal jurisdiction over child sexual abuse of Indian children.

This legislation could beneficially effect large numbers of Indian children. According to the 1980 Census, there are 119,313 Indian children under the age of 17 residing on reservations. (See Table 55, General Population characteristics.) This number does not include Indian children from approximately 30 tribes in Oklahoma who are omitted from the "reservation" category of the Census classification structure. Between 30,000 and 40,000 Indian children in Oklahoma should be included in the aggregate total. Therefore, H. 3826 could impact upon approximately 160,000 Indian children under the age of 17.

H. 3826 is an important first step towards solving the problem. It is, however, only the first step because it only improves the last stage in a flawed process. I view the process as including five stages which involve five disciplines and their respective tribal or federal service providers. These five stages are: recognition or identification, reporting, investigation, treatment and prosecution. The five disciplines and their service providers are: (1) Education - tribe, Bureau

of Indian Affairs (BIA), Headstart, school boards; (2) Social Service - tribe, BIA, Indian Health Service (IHS); (3) Health Care - tribe, IHS; (4) Law Enforcement - tribe, BIA, Federal Bureau of Investigation (FBI); and (5) Courts/Prosecutors - tribe, U.S. Attorney's office, federal district court. The traditional providers of child welfare services on reservations have been the BIA and IHS, and within the last decade, tribal governments have delivered these services themselves under the Indian Self-Determination and Education Assistance Act. A tribe may also provide services through one or more of the above disciplines under discretionary and categorical funding from the Office of Human Development Services (OHDS) of the U.S. Department of Health and Human Services (HHS), as well as the U.S. Department of Justice (DOJ).

While prosecution is the last stage, the first stage, recognition or identification, is flawed by lack of uniformity among service providers, such as IHS, BIA, Headstart, and the tribe, on how to recognize the characteristics of child abuse. The second stage, reporting requirements, is likewise flawed by a lack of uniformity among the same service providers on how to report suspected abuse and on those who are required to report. Headstart is the only federal program which has historially imposed mandatory reporting to tribal courts. The third stage, investigation, suffers from lack of uniformity on the proper procedures of investigation and the gathering of medical and forensic evidence in suspected cases of child sexual abuse.

Finally, in stage four, treatment, there is no clear understanding or agreement among the service providers on who provides medical and psychiatric treatment to both the perpetrator and the victim.

In closing, while this legislation will resolve a part of the total problem, the final solution depends upon the cooperative efforts of the Departments of the Interior, Justice and Health and Human Services to address the remaining problems I have cited. I am pleased to report that these departments have informed me of their interest in exploring the possibility of coordinating policies and procedures. In December, I met with the Commissioners of the Administration for Native Americans and the Administration of Children, Youth and Families, both of whom responded positively. I want to express my appreciation for your efforts to alleviate the problem of prosecuting child sexual abuse offenders in Indian country. Anything you can do to assist these federal agencies in promulgating uniform policies and procedures would help to prevent a crisis from erupting in Indian country.

BEST COPY AVAILABLE

Association on American Indian Affairs, Inc.

95 Madison Avenue
New York, N.Y. 10016-7877
(212) 689-8720

Dr. Idrian N. Resnick
Executive Director

Officers
Alfonso Ortiz, Ph.D., *President*
Benjamin C. O'Sullivan, *Vice President*
Richard A. Hallowell, *Vice President*
Jo Mokasic Lewis, *Secretary*
J. Kermit Birchfield, Jr., *Treasurer*

STATEMENT OF THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC. ON H.R. 3826 SUBMITTED BY DR. IDRIAN N. RESNICK, EXECUTIVE DIRECTOR, AND JACK F. TROPE, STAFF ATTORNEY, TO THE CRIMINAL JUSTICE SUBCOMMITTEE OF THE HOUSE JUDICIARY COMMITTEE ON JANUARY 30, 1986

We are pleased to submit this testimony on H. R. 3826 in response to your request. The Association on American Indian Affairs, Inc. is a national citizens' organization headquartered in New York City with 50,000 members, both Indian and non-Indian. It is dedicated to the preservation and expansion of American Indian and Alaska Native rights. The policies and programs of the Association are formulated by a Board of Directors, the majority of whom are American Indian and Alaska Native.

This bill, and its companion bill, S. 1818, would add felonious sexual molestation of a minor to the list of crimes covered by the Major Crimes Act (18 U.S.C. sec. 1153). It is a response to a perception that some individuals who have committed serious sexual offenses against children in Indian country have not been adequately punished. In the course of our work in the northern Great Plains and elsewhere, AAIA has been informed by a number of tribal leaders that some cases involving serious sexual offenses by Indians against Indians committed on the reservation have not been prosecuted in federal court--despite tribal requests--because of perceived inadequacies in the current federal statute. U. S. Attorneys in some states have interpreted the current statute as not covering certain types of serious sexual abuse which do not involve the act of intercourse. In these cases, the only remedy available to tribes and affected individuals has been utilization of tribal courts, which are limited by the Indian Civil Rights Act to imposing penalties of 6 months in jail and a $500 fine.

We support legislation that would give tribes and affected individuals the option to invoke the federal system in serious sexual abuse cases involving minors where the tribal court is unable or unwilling to adequately respond to the crime. To the extent that this Committee is interested in passing legislation that creates such an option where it does not presently exist, we are supportive of this committee's efforts.

However, we have some concern with this legislation in its current form. First, it must be made clear what this legislation does not do--namely, that it does not deprive tribes of concurrent jurisdiction to deal with these crimes. Although the legislative history of the Major Crimes Act seems to support the notion that tribes have concurrent

BEST COPY AVAILABLE

jurisdiction over crimes covered by the Major Crimes Act, there has never been a definitive Supreme Court decision on this jurisdictional issue. Thus, it is important to be clear in this legislation that the passage of this Act does not deprive tribes of any authority which they currently possess. Ideally, this jurisdictional concept should be worked into the legislation itself. At the least, the Committee Report should explicitly state that this bill does not deprive tribes from exercising their preexisting jurisdiction over these cases and that the purpose of this bill is simply to provide an alternative forum for prosecution of serious sexual abuse offenses. This is important not only from an "Indian sovereignty" perspective, but also from a practical standpoint. Federal authorities often do not deal with these types of cases for other than jurisdictional reasons. Particularly in the case of the less serious varieties of sexual abuse, prosecution of these crimes may not be a high priority for federal authorities and the authorities might be reluctant to commit substantial investigative and legal resources to ensure that such crimes are prosecuted. Also, there may be evidential problems in some sexual abuse cases that will make it difficult for U. S. Attorneys to prosecute. In such cases, a tribal court may be better able to overcome jurisdictional and evidential hurdles and penalize the offender. In addition, in some intrafamilial cases, a local tribal-based solution emphasizing treatment may be preferable to federal prosecution. Thus, it is important that the tribal option be preserved. Otherwise, this legislation could create a bigger loophole than it closes.

Moreover, we would note also that the long-term solution to the problem of prosecuting sexual crimes is to empower a strengthened tribal court system with increased authority to deal with these cases where they happen--at the local level. Passage of this bill should be viewed as a temporary palliative; it should not be viewed as a step toward a long-term solution and should not be taken as a signal of a retreat from the goal of strengthening Indian institutions, including the tribal court, in order to provide true Indian self-determination and enhance the ability of Indian people to control their own lives. We ask the Committee to make this principle clear in its report to Congress on this legislation.

Finally, we have serious doubts about the method which this bill has chosen for remedying this problem. It chooses to include a general category of sexual offenses ("felonious sexual molestation of a minor") in the Major Crimes Act that will be defined by state law. Some states no longer use the felony/misdemeanor distinction, however. That may create a definitional problem and lead to claims that the legislation is unduly vague. In addition, it is possible that some less serious crimes will be brought under federal jurisdiction which could infringe upon tribal sovereignty. Moreover, although some Major Crimes are defined by state law currently, we believe this to be a bad policy generally as it

BEST COPY AVAILABLE

creates multiple definitions of a single federal offense. Indeed, several reservations overlap two or more states and for those reservations different laws would be applicable depending upon where on the reservation the offense occurred. As reservations constitute distinct political entities, we believe that such a result is irrational and unwise; all Indians residing on a given reservation should be subject to the same criminal laws wherever possible. We believe that this legislation should not utilize state definitions; rather it should explicitly and uniformly define in the federal statute itself the cases it means to cover -- the more serious varieties of sexual abuse. A variation of the definition of "sexual act" in H. R. 596, currently before this committee, might be considered. Thus, "felonious sexual molestation of a minor" might be defined as "an involuntary act involving a person under 18 or a non-coercive act involving a person under 16 and an adult at least 4 years older than the minor which involves (a) contact between the penis and the vulva or the penis and the anus, however slight, (b) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus, or (c) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object with an intent to abuse, humiliate, harass, degrade, arouse or gratify the sexual desire of any person." This definition is similar to that in many state codes and would cover the most serious cases of child sexual abuse. An appropriate range of sentencing for these offenses could be included in the bill. Less serious sexual contact cases would remain under exclusive tribal jurisdiction. We hope that you will consider amending the legislation to incorporate this approach.

In short, then, we support the purpose behind the bill but would like to see it drawn more narrowly and carefully to reflect that purpose and no more. Thank you again for inviting us to submit this statement.

BEST COPY AVAILABLE

AMERICAN INDIAN LAW CENTER, INC.
P.O. BOX 4456 - STATION A
1117 STANFORD, N.E.
ALBUQUERQUE, NEW MEXICO 87196
PHONE (505) 277-5462

February 4, 1986

Tom Hutchison
Counsel, Subcommittee on Criminal Justice
Committee on the Judiciary
U.S. House of Representatives
H2-362 House Office Building
Annex II
Washington, D.C. 20515

Dear Mr. Hutchison:

As per your request, attached is my response to the four issues you raised on H.R. 3826 following the hearing January 30, 1986. I am sorry I will be unable to attend the meeting with you and other interested Indian organizations tomorrow.

Sincerely,

Nancy N. Tuthill

Nancy N. Tuthill, Esq.
Director

enclosure

BEST COPY AVAILABLE

RESPONSE TO QUESTIONS RAISED DURING TESTIMONY ON H.R. 3826 BY NANCY M. TUTHILL, ESQ., DIRECTOR OF THE AMERICAN INDIAN LAW CENTER, INC.

1. Definition of "felonious sexual molestation":
and
2. Uniform Punishment

The issues raised in the questions concerning uniformity of definition and punishment are identical in many respects, so I will deal with both of them together. I would prefer uniformity of punishment as well as definition, for I appreciate the difficult situation confronting those eight tribes, like Navajo, which span more than one state. (Other tribes include Standing Rock, Sisseton-Wahpeton, Colorado River, Duck Valley, Fort McDermitt, Winnebago, and Washoe). However, the inability of tribes to effectively combat the problem of child sexual abuse has reached crisis proportions and my primary concern is for an immediate vehicle for prosecution of child sexual offenders. If opposition to uniformity would prevent or even delay creation of a federal offense for child sexual abuse, I must support the bill as is.

With respect to the issue of the definition, H.R. 3826 and S. 1818 as written contain no federal definition of felonious sexual molestation, so that state definitions will apply. While each state's definition may differ, P.L. 98-457 creates minimum definitions with which states must comply in order to receive federal funding. To compare the actual differences among the various states with Indian reservations I would refer you to a study completed by the National Center for Child Abuse and Neglect in 1984 entitled "State Child Abuse and Neglect Laws: A Comparative Analysis." This research and the publications were funded by the U.S. Department of Health and Human Services, Office of Human Development Service, Administration for Children, Youth and Families, Publication number 21-01030. Mr. Jay Olson, Social Science Program Specialist, at the National Center may be able to provide additional information on the issue of uniformity of definition.

I also understand that the definition embodied in H.R. 596 has been proposed as an alternative definition. If the committee overcomes the opposition to this legislation and considers it as an alternative, you should be aware that it contains several flaws in defining child sexual abuse within the Major Crimes Act. Specifically, it does not include sexual contact which stops short of actual penetration for those offenses falling within the Major Crimes Act, and does not include attempted sexual acts, even though other crimes within H.R. 596 and state laws often do.

BEST COPY AVAILABLE

I would also like to suggest that in the event the committee considers including uniformity of punishment and definition, the committee should address the crimes of burglary, involuntary sodomy and incest for the same reasons. While many of the crimes enumerated in the Major Crimes Act are defined by federal law, the offenses of burglary, involuntary sodomy and incest are defined and punished in accordance with the laws of the state in which the offense was committed.

2. Concurrent jurisdiction

As I understand the concern on this issue, it is that federal prosecution will preempt and foreclose tribal prosecution of sex offenders, leaving tribes without recourse if the U.S. Attorney declines prosecution. I agree that this a serious concern, however it appears that as a practical matter it will not preclude tribal prosecution. In any event, language in the committee report can easily make clear that the legislative intent is that the bill not preclude tribal prosecution, but in fact, will create concurrent jurisdiction with the federal government.

In U.S. v. Wheeler, 435 U.S. 313 (1978), the Supreme Court ruled that an Indian offender may be prosecuted for the same act in tribal court and then in federal court under the Major Crimes Act without creating double jeopardy. The decision was based on the reasoning that the tribal and federal governments were separate sovereigns, and could therefore prosecute for the same act. While in Wheeler, the tribe prosecuted an Indian offender for a lesser included offense, and the federal government prosecuted the same offender under the Major Crimes Act, the reasoning could be applied to prosecution for child sex abuse. While I believe that the Wheeler rationale protects the tribes' concurrent jurisdiction, the committee report language can easily make legislative intent clear. In the event that a tribe is concerned that they cannot prosecute for child sexual abuse if the U.S. Attorney's office declines prosecution, they may wish to enact a tribal ordinance which defines sexual abuse as a lesser included offense.

4. Extension of incarceration and penalty fee

The present limitations of the Indian Civil Rights Act, 25 U.S.C. sec. 1302(7), in many cases, may not be sufficient when sentencing an offender in tribal court. Although I support increasing the limitiation to one year incarceration and/or $1,000 fine, I would rather this be proposed under separate legislation.

○

59-180 (44)